STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JAMES W. HENRIE	:	
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2008 through November 30, 2008.[1]	:	DECISION DTA NOS. 825871 AND 825872
In the Matter of the Petition	:	
of	:	
MICHAEL M. McBRIDE	:	
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2008 through November 30, 2008.	:	

Petitioners, James W. Henrie and Michael M. McBride, filed an exception to the determination of the Administrative Law Judge issued on July 14, 2016. Petitioners appeared by Ballon Stoll Bader & Nadler, P.C. (Avraham Cutler, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard in New York, New

[1] The petitions in this matter indicate May 1, 2008 as the beginning of period at issue. The determination's caption indicates June 1, 2008 as the beginning of the period at issue. As the petitions seek refunds of sales tax payments made with respect to certain assessments, the earliest of which relates to a period beginning on March 1, 2008, we use that date as the commencement of the period at issue.

York on June 22, 2017, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioners are personally liable for the sales and use taxes due from NS Partners, LLC as persons required to collect and pay such taxes under Tax Law §§ 1131 (1) and 1133 (a).

II. Whether, if so, petitioners are entitled to relief under the tax policy set forth in TSB-M-11(17)S.

III. Whether, if not, petitioners have established any facts or circumstances warranting the reduction or abatement of the penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 1, 4, 8, 9, 11 through 16, and 20 through 23. We have also added additional findings of fact, numbered 24 and 25. We make these changes to more fully and accurately reflect the record. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact appear below.

1. Namwest, LLC (Namwest) was a firm that invested in commercial real estate in the United States. In or about February 2005, Namwest purchased a hotel, known as Holiday Inn Select, from Servico New York, Inc. Namwest was the 100% owner of Namwest of Niagara, LLC, which owned 99% of NS Partners, LLC (NS Partners). The remaining 1% was owned by Namwest Niagara MM, Inc. Petitioner Michael McBride, who was the manager of Namwest, executed the purchase agreement on its behalf.

2. On April 6, 2005, NS Partners was organized in New York State as a limited liability company. Petitioners were members of NS Partners.

3. NS Partners was created by Namwest with the intention of transforming the Holiday Inn Select located in Niagara Falls, New York, into an upscale Crowne Plaza Hotel.

4. On or about July 11, 2005, NS Partners entered into a management agreement with Sentry Hospitality of Western New York (Sentry). Michael McBride signed the agreement on behalf of NS Partners in his capacity as president of Namwest Niagara MM, Inc. Under the management agreement, NS Partners delegated to Sentry the right to hire, fire and supervise hotel employees. The management agreement accorded NS Partners the right to review the hotel's books and records. NS Partners also had an employee on the premises (the owner's representative) tasked with overseeing the daily activities of Sentry. The duties of the owner's representative, who was hired following an interview with both petitioners, included participating with Sentry in decisions to hire and fire employees. The owner's representative had authority to direct hotel employees to complete specific tasks as necessary, such as maintenance or housekeeping. The owner's representative was thus the primary method by which NS Partners asserted control over the hotel's employees. The owner's representative continued in that capacity throughout the period at issue. He reported to Mr. McBride, who made frequent visits to the hotel. Mr. Henrie made a few visits to the hotel.

5. On May 23, 2005, Michael McBride filed a New York State application for registration as a sales tax vendor on behalf of NS Partners. Mr. McBride was listed as manager on the form. At or about the same time, NS Partners filed an application for alcoholic beverage control retail license with the State of New York Liquor Authority. James W. Henrie and Michael McBride

were each listed as having a 16.6% share of ownership of NS Partners. Their signatures appear on the application and on an attachment to the application.

6. Kathy Miller, also known as Kathleen Miller, signed sales tax returns during and after the period at issue as an agent of NS Partners.

7. In early 2007, NS Partners was approved for a grant in the amount of $5,500,000.00[2] from the Empire State Economic Development Fund. The terms of the grant required NS Partners to meet certain employment goals that were subsequently satisfied. In addition, NS Partners received exemptions from sales tax.

8. In December 2006, NS Partners engaged in negotiations with Gramercy Capital Corp. (Gramercy) for financing to pay off existing loans and to complete the renovation of the property. The terms of this $30,045,000.00 loan were summarized in a letter dated December 12, 2006 from Gramercy to Mr. Henrie as principal of Namwest. Mr. Henrie signed the letter, as a principal of the borrower, to indicate agreement to the terms of the loan.

9. In March 2007, the loan transaction between NS Partners and Gramercy was completed. Namwest Niagara MM, Inc. by Michael McBride, as president, executed the loan agreement on behalf of NS Partners.

Under the terms of the loan agreement, the management agreement between NS Partners and Sentry was collaterally assigned to Gramercy as security for the loan and subordinated to the loan. The loan agreement also required that Gramercy approve the management agreement. The loan agreement further provided that all receipts from the hotel's business were to be deposited into a clearing account. All such deposits into the clearing account were to be free of all taxes,

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[2] There is a conflict in the record regarding the amount of the grant. The total amount of the grant may have been as much as $6,000,000.00.

and, if taxes were deducted from such deposits, NS Partners was required to make up those amounts. All funds in the clearing account were swept daily by the clearing bank and deposited into a deposit account (also referred to as a lockbox), which was under Gramercy's sole control. NS Partners had no right to draw from the deposit account. Additionally, the loan agreement provided for a first priority for the perfected mortgage encumbering the property, and a first priority perfected security interest in all monies deposited into the clearing account and deposit account, including all subaccounts, escrow accounts and reserve accounts. According to the loan agreement, Gramercy had the right to act as a servicer, at the borrower's expense, and to act as its agent in connection with the loan. The loan was a full recourse loan to the principals, James Henrie and Michael McBride, who were also guarantors of the loan.

The loan agreement provided that funds for the payment of the hotel's operating expenses would be disbursed from the lockbox to the borrower upon request, provided that the request was for an approved operating expense. An approved operating expense is defined in the loan agreement as one that is included in the approved operating budget or otherwise approved by Gramercy. The approved operating budget is defined in the loan agreement as an estimate of operating expenses made at the beginning of the calendar year.

As part of its duties under the operating agreement, Sentry made requests of Gramercy for disbursements from the lockbox in order to pay hotel's operating expenses. Prior to March 2008, Gramercy generally met Sentry's requests and Sentry generally paid the hotel's operating expenses, including payment of sales tax, from the hotel's operating account.

10. NS Partners used $3 million of the grant from the Empire State Economic Development Fund to pay down the Gramercy loan. The balance of the loan was distributed to SWB Enterprises, LLC (SWB). During the period in issue, SWB owned 100% of Namwest.

11. The ownership of SWB, and hence the indirect ownership of NS Partners, changed over time. At one point Ezri Namvar owned 50% of the firm and the remaining three partners, including the petitioners herein, owned equal one-third interests in the remaining 50% of the enterprise. Mr. Namvar later withdrew from the firm and, during the period in issue, James Henrie and Michael McBride each possessed 33.33% ownership interests.

12. NS Partners fell into arrears in school taxes and property taxes for the years 2007 and 2008. A subsequent owner of the property, GKK Hotel Niagara Owner LLC, paid some back taxes on the property in 2010, but the record does not show whether such payment included any of NS Partners' 2007 and 2008 liabilities.

13. In March 2008, NS Partners was declared to be in default of the mortgage because it had failed to remain current in satisfying its sales and real property tax obligations. This declaration is consistent with the loan agreement, which expressly provides that a failure to pay any taxes when due is an "event of default." Green Loan Services, LLC (Green Loan Services), a Gramercy affiliate that serviced the loan, advised NS Partners that the failure to pay the taxes was a default and that the failure to cure would constitute an event of default.

14. As a result of the default in taxes and another default related to payables exceeding the amount permitted in the loan agreement, Green Loan Services sent a notice of default in March 2008 to NS Partners. Thereafter, consistent with its rights under the loan agreement and mortgage, Gramercy assumed complete control over the operations and operating revenue of the hotel. Gramercy, in consultation with Sentry, determined which creditors would be paid and released funds from the lockbox to the hotel's operating account for payment by Sentry. After Gramercy took control, NS Partners had no say in determining which creditors of the hotel would be paid. Sentry continued to operate the hotel after March 2008, but now reported to Gramercy.

Sentry employees thus continued to collect hotel revenue, including sales tax, and to deposit such funds into the clearing account. Gramercy would release money into the hotel's operating account, to which only Sentry had access, and then Sentry would write checks to creditors. NS Partners reminded Gramercy of its obligation to pay sales taxes, but Gramercy chose not to release funds for that purpose. The owner's representative continued to be present at the hotel after March 2008, but without his previous authority. His function was thus limited to observing hotel operations while the principals of NS Partners sought to negotiate a resolution to the default and to regain control of their property. At one point, Gramercy demanded a cash infusion of $1,200,000.00 from NS Partners, but NS Partners was unable to secure such funding.

15. For the tax period ended May 31, 2008, NS Partners reported that sales tax was due in the amount of $189,883.04. However, payment was not remitted with the return. For the tax period ended August 31, 2008, the sales and use tax return was due on September 22, 2008. However, it was not received until September 29, 2008. The return reported that tax was due in the amount of $351,766.55. However, it was filed without remittance. For the tax period ended November 30, 2008, the return was due on December 22, 2008. However, it was not received until December 29, 2008. The return reported that tax was due in the amount of $186,477.51. There was a timely payment of $70,758.97 and a late payment of $37,911.11. The checks for each of the latter two payments were signed by Kathy Miller.

16. Mr. Henrie filed a New York State personal income tax return for the year 2006 wherein he claimed empire zone (EZ) wage credits and qualified empire zone enterprise (QEZE) real property tax credits based upon his status as a member of NS Partners.[3]

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[3] Since NS Partners was an LLC that filed as a partnership, the entity's QEZE and EZ credits flow through to the personal income tax returns of the members.

17. The Division of Taxation (Division) conducted an audit of Mr. Henrie's tax return for 2006. Initially, the Division denied the credits. Mr. Henrie appealed the denial of the credits and, based upon documentation provided by Mr. Henrie, the Division concluded that the employees of Sentry should be considered the employees of NS Partners for purposes of the credits. As a result, the credits were allowed.

18. Mr. Henrie and Mr. McBride filed New York State personal income tax returns for the years 2008 and 2009 wherein they claimed EZ and QEZE credits based upon their status as members of NS Partners. The application of the credits would have resulted in the payment of refunds. In the course of reviewing petitioners' claimed enterprise zone tax credits for 2008, petitioners provided information showing that the 2008 ownership interests of Michael McBride, James Henrie and David Cutler in NS Partners were each 33.33%.

19. On March 24, 2009, Supreme Court Justice Richard C. Kloch, Sr., issued an ex-parte order appointing Michael J. Norris a receiver of the rents and profits of NS Partners. The receiver was ordered to pay only the current taxes and not the taxes due from the time of the hotel's seizure by Gramercy. On September 8, 2009, Mr. Norris's application for a new liquor license as a receiver of NS Partners was granted.

20. The Division issued a series of notices of determination to Michael McBride and James Henrie, which assessed sales and use taxes as follows:

Date of Notice	Period Ended	Tax	Interest	Penalty	Balance Due
05/26/09	05/31/08	$189,883.04	$28,416.29	$41,297.57	$259,596.90
05/26/09	08/31/08	$351,766.55	$39,316.74	$66,540.76	$457,624.05
07/27/09	11/30/08	$77,807.43	$9,014.20	$18,574.48	$105,396.11

Neither petitioner timely filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals in protest of the notices of determination. Notices and demands for payment of the respective assessed liabilities were subsequently issued to petitioners in September and November 2009.

21. On November 15, 2011, the Division issued an account adjustment notice - personal income tax to petitioner Michael McBride and his spouse pertaining to tax year 2008. The notice indicates that petitioner's reported overpayment of $767,096.00, consisting of payments and refundable credits, was reduced to $15,982.81. The notice further indicates that $383,548.00 of the overpayment had been previously applied to other New York State tax liabilities and that $367,565.19 of the overpayment was being applied to the liabilities asserted in the notices of determination that had been issued to him (***see*** finding of fact 20). The account adjustment notice indicates that the $367,565.19 of overpayment was being applied to the sales tax assessments as follows:

Assessment for Period Ended	Payment Amount
05/31/08	$86,077.68
08/31/08	$220,935.50
11/30/08	$60,552.01

On or about December 3, 2011, the Division refunded $38,880.90 of the offset to Mr. McBride. There is no explanation in the record for this refund.

On November 22, 2011, the Division issued an account adjustment notice to petitioner McBride and his spouse concerning the 2009 tax year. This account adjustment notice indicates a small increase to petitioner's claimed refund amount resulting from changes to the amount of NS Partners' claimed QEZE real property tax credit and EZ wage tax credit.

22. On November 15, 2011, the Division issued an account adjustment notice - personal income tax to petitioner James Henrie and his spouse for tax year 2008 that bore the same information as that sent to Mr. McBride. Specifically, the notice indicates that petitioner's reported overpayment of $767,096.00, consisting of payments and refundable credits, was reduced to $15,982.81. The notice further indicates that $383,548.00 of the overpayment was previously applied to other New York State tax liabilities and that $367,565.19 of the overpayment was being applied to the liabilities asserted in the notices of determination that had been issued to him (***see*** finding of fact 20). The account adjustment notice indicates that the $367,565.19 of overpayment was being applied to the sales tax assessments as follows:

Assessment for Period Ended	Payment Amount
05/31/08	$86,077.68
08/31/08	$220,935.50
11/30/08	$60,552.01

On November 29, 2011, the Division issued an account adjustment notice to petitioner Henrie and his spouse concerning the 2009 tax year. Like the account adjustment notice issued to petitioner McBride for the 2009 tax year, this notice indicates a small increase to petitioner's refund amount resulting from changes to the amount of NS Partners' claimed QEZE real property tax credit and EZ wage tax credit.

23. Mr. McBride and Mr. Henrie each filed refund claims in the amount of $367,565.19 for the monies applied to their assessed sales tax liabilities.[4] On May 23, 2012, the Division issued letters to Mr. McBride and Mr. Henrie denying their claims for refunds of sales and use

[4] The amount of Mr. McBride's refund claim does not appear to take into account the $38,880.90 previously refunded to him (***see*** finding of fact 21).

taxes. The denial letters state the Division's position that, as members of a limited liability company, Mr. McBride and Mr. Henrie are liable per se as persons required to collect tax pursuant to Tax Law § 1131 (1). The petitions herein contest the May 23, 2012 refund denials.

24. The Division's audit of petitioners' 2008 returns determined that petitioners properly claimed their respective proportionate shares of NS Partners' 2008 EZ wage tax credit and QEZE real property tax credit. The Division thus determined that petitioners each properly claimed refundable QEZE real property tax credit of $353,165.00 and refundable EZ wage tax credit of $30,383.00. The QEZE real property tax credit was premised on a Division finding that NS Partners paid $1,081,007.33 in real property taxes in 2008. The EZ wage tax credit continued to be premised on the Division's conclusion that employees on Sentry's payroll were properly deemed NS Partners' employees for purposes of the credit (***see*** finding of fact 17). The Division's audit of petitioners' 2009 returns similarly concluded that petitioners properly claimed QEZE real property tax credit based on real property taxes paid by NS Partners and EZ wage tax credit for employees on Sentry's payroll.

25. Mr. McBride signed NS Partners' 2008 New York partnership return (form IT-201) as the LLC's general partner. His signature on the return in evidence is dated April 15, 2010.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that Tax Law §§ 1131 (1) and 1133 (a) impose per se liability upon members of a limited liability company where the LLC fails to properly collect or remit sales tax. Accordingly, the Administrative Law Judge determined that petitioners, as members of NS Partners, LLC, were personally liable as asserted by the Division.

The Administrative Law Judge rejected petitioners' argument that, given Gramercy's control of the hotel during the period at issue, neither NS Partners nor petitioners may be

considered persons responsible for the collection and payment of sales tax during that period. While the Administrative Law Judge found that Gramercy was in control of the hotel during the period at issue, he determined that such control resulted from the loan agreement. The Administrative Law Judge thus concluded that NS Partners' lack of authority during the relevant period was the result of the decision by its members to enter into that agreement. Under such circumstances, the Administrative Law Judge concluded, the LLC and its members remained responsible to pay the hotel's sales tax liabilities.

The Administrative Law Judge also rejected petitioners' claim that they should not be liable for penalties assessed herein. The Administrative Law Judge found that petitioners' inability to cause NS Partners to pay its sales tax liabilities was a result of petitioners' own creation and was a foreseeable consequence of financial difficulties. The Administrative Law Judge thus concluded that the failure herein was a dereliction of duty by petitioners and sustained the imposition of penalties.

Additionally, the Administrative Law Judge found that petitioners were not entitled to relief under the Division's policy for certain LLC members as described in technical memorandum TSB-M-11(17)S ("New Policy Relating to Responsible Person Liability Under the Sales Tax Law" [September 19, 2011] [described more fully ***infra***]). The Administrative Law Judge determined that petitioners exercised substantial authority over the business and financial affairs of NS Partners before Gramercy took over the hotel's operation and that, accordingly, petitioners did not qualify for relief under the policy. The Administrative Law Judge also rejected petitioners' argument that the Division's assertion of liability against petitioners was inconsistent with the policy. The Administrative Law Judge thus denied petitioners' equal protection claim.

ARGUMENTS ON EXCEPTION

As they did below, petitioners assert that NS Partners did not collect sales tax during the period at issue because Gramercy had taken control of the hotel and that, accordingly, NS Partners was precluded from exercising any involvement in hotel operations, including the payment of sales taxes. Petitioners argue that an otherwise responsible person may be relieved of liability where that person is prevented from exercising responsibility through no fault of his or her own. Given NS Partners' lack of authority, petitioners reason, they may not be held personally liable for the unpaid taxes at issue pursuant to this principle.

As they also asserted below, petitioners contend, alternatively, that they should not be liable for more than their proportionate ownership interest in NS Partners in accordance with the Division's policy as detailed in technical memorandum TSB-M-11(17)S. Petitioners contend that they are eligible for relief under the policy because they were minority owners of NS Partners and did not control the business during the period at issue. Petitioners also contend that the Division must fairly and consistently apply this policy and that the failure to do so in the present matter results in unequal treatment contrary to the Equal Protection Clause of the Federal and State Constitutions.

Petitioners also seek abatement of penalties and interest as asserted in the statutory notices. They argue that they were not in control of the hotel's operations after Gramercy took over in March 2008. Petitioners assert, accordingly, that they were thus without fault in the hotel's failure to properly pay sales tax.

The Division argues that, as members of a limited liability company, petitioners were persons responsible to collect and remit sales tax on behalf of NS Partners.

The Division also contends that petitioners have not demonstrated that they are eligible for relief pursuant to its policy as described in the technical memorandum. Rather, the Division asserts that petitioners were essential participants in the management of NS Partners and thus were under a duty to comply with the Tax Law on its behalf. As such, the Division contends, petitioners do not qualify for favorable treatment afforded minority owners of an LLC who are not under such a duty.

The Division asserts that cases cited by petitioners in support of their contention that they were precluded from exercising authority on behalf of the LLC are distinguishable and that more pertinent precedent supports its position.

The Division argues that its policy of forbearance as contained in the technical memorandum does not apply to petitioners, given their roles as essential participants in the management of NS Partners. The Division further argues that there is no basis for petitioners' constitutional claim.

Finally, the Division contends that petitioners have not shown reasonable cause to justify abatement of penalties for NS Partners' failure to timely meet its sales tax obligations.

OPINION

Tax Law § 1133 (a) imposes liability for sales and use taxes upon all persons required to collect such taxes. "Persons required to collect tax" includes "every vendor of tangible personal property or services" and "every operator of a hotel" (Tax Law § 1131 [1]).

There is no question that, as operator of the hotel and a sales tax vendor, NS Partners was liable for sales and use taxes pursuant to Tax Law §§ 1131 (1) and 1133 (a) prior to March 2008. As noted, however, petitioners contend that when Gramercy took control of the hotel in March 2008, NS Partners no longer had any say in hotel operations and thus was no longer a vendor or

hotel operator and, therefore, was no longer liable. Petitioners bear the burden of proof to establish this contention by clear and convincing evidence (***see Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

This Tribunal has previously held that a person required to collect sales tax is not relieved of liability where a creditor takes action pursuant to an agreement with the business and such action results in the nonpayment of sales taxes (***see Matter of Kieran***, Tax Appeals Tribunal, November 13, 2014; ***Matter of Button***, Tax Appeals Tribunal, January 28, 2002).

This is precisely what occurred in the present matter. NS Partners voluntarily entered into the loan agreement with Gramercy. The terms of the loan agreement allowed Gramercy to take certain actions in the event of a default by NS Partners. A failure to pay any taxes when due is expressly defined as a default in the loan agreement (***see*** finding of fact 13). NS Partners thus defaulted on the loan by failing to pay sales and real property taxes (***id.***). As a consequence, Gramercy took certain actions, including taking control over deciding which of the hotel's creditors got paid. Gramercy's actions were within its rights under the loan agreement (***see*** finding of fact 14). By entering into the loan agreement, NS Partners thus "voluntarily created the scenario which led to [its] inability to pay . . . sales and use taxes" (***Matter of Button***). Accordingly, and contrary to petitioners' contention that NS Partners was without fault in connection with the failure to pay the hotel's sales taxes, any "preclusion from action" on the part of NS Partners was its "own creation" and was a clearly foreseeable outcome in the event of a default (***see Matter of Kieran***; ***Matter of Button***). In other words, this consequence of its default (i.e. the nonpayment of sales taxes) was one of the "risks [NS Partners] chose to take in running [its] business enterprise" (***Matter of Button***). Accordingly, we conclude that NS Partners remained liable for the collection and payment of sales taxes during the period at issue herein.

The foregoing conclusion is premised on the well-established principle that financial problems do not excuse a failure to collect and remit sales tax (***see Matter of Hopwood***, Tax Appeals Tribunal, February 19, 2017; ***Matter of Stafford***, Tax Appeals Tribunal, May 11, 1995). Here, NS Partners' failure to cure the default was plainly a financial problem (***see*** finding of fact 14).[5]

Our conclusion also follows from the well-established rule that a person required to collect sales tax may not relieve himself of responsibility for operating a business and expect to be relieved of sales tax liability (***see Matter of Napoli***, Tax Appeals Tribunal, July 13, 1995). Accordingly, NS Partners may not escape liability here through the loan agreement, which NS Partners voluntarily entered into, and by which Gramercy took control of the business as a result of NS Partners' foreseeable default.

Similarly, one cannot continue to derive benefit from the continued operation of a business and be relieved of liability for sales taxes (***id.***). Here, NS Partners' continuing ownership of the hotel during the period at issue yielded significant benefits in the form of refundable tax credits that flowed to its owners (***see*** findings of fact 18, 21 and 22).

The cases cited by petitioners in support of their contention that NS Partners was not a person responsible to collect tax are distinguishable. In ***Matter of Stern*** (Tax Appeals Tribunal, September 1, 1988), an officer of a corporation was determined to be not responsible for the corporation's unpaid sales tax after a creditor seized the corporation's assets. Unlike the present matter, however, the creditor's seizure in ***Stern*** was triggered by the unilateral acts of another

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[5] On this point, we note our disagreement with petitioners' characterization of the default as "technical." Petitioners apparently take this position because NS Partners was current on its loan payments. While NS Partners' failure to pay its real estate and sales taxes in the first instance may have been due to a mistake and thus conceivably a "technical" error as petitioners assert, the record shows that it failed to cure the default because it lacked the financial resources to do so.

officer of the corporation, including ordering the corporation's banks not to honor checks drawn on the corporation's accounts. Hence, unlike NS Partners, the taxpayer in ***Stern*** did not voluntarily give up control of his business. In ***Chevlowe v Koerner*** (95 Misc 2d 388 [Sup Ct, Queens County, 1978]), the court reviewed various indications of authority in determining whether a corporate officer should be personally responsible to pay a corporation's sales taxes. The court found that the corporate officer was not personally liable for the corporation's sales taxes because there were no such indications of authority present with respect to the officer during the period at issue. Although, as petitioners note, the court found that the appointment of a receiver ended "any manifestation of control" by the officer (95 Misc 2d at 392), in our reading the decision concludes that the taxpayer therein was not a responsible officer irrespective of the appointment of a receiver.

Petitioners also cite ***Matter of Kieran*** and ***Matter of Button*** in support of their position. As discussed previously, however, those cases support the converse of their position.

The definition of a person required to collect tax under Tax Law § 1131 (1) also includes any member of a limited liability company. Accordingly, as NS Partners has been determined to be liable herein pursuant to Tax Law §§ 1131 (1) and 1133 (a), it follows that petitioners, as members of NS Partners, are also liable for sales taxes due from NS Partners pursuant to the same provisions (***see Matter of Boissiere***, Tax Appeals Tribunal, July 28, 2015).

As noted, petitioners also contend, alternatively, that they are eligible for relief under the Division's policy relating to certain LLC members who are responsible persons under Tax Law § 1131 (1), as detailed in technical memorandum TSB-M-11(17)S. Generally, that policy limits the responsible person liability of an eligible person to the greater of that person's percentage of ownership of the business or percentage share of the profits and losses of the business. To

qualify as eligible, the technical memorandum provides that LLC members must show that their ownership interest and profit and loss interests are less than 50% and that they were not under a "duty to act" for the LLC in complying with the Tax Law. The technical memorandum further provides that LLC members must also agree to certain terms and conditions contained in a written statement by the Division by which the LLC member agrees to cooperate with the Division to provide information to identify other potentially responsible persons of the LLC and to provide information regarding the business's overall ownership structure. Relief under the policy, which took effect March 9, 2011, also includes abatement of penalties and penalty interest.

Petitioners contend that they were not under a duty to act for NS Partners during the period at issue and are therefore eligible for relief under the policy. The Division takes the position that petitioners failed to establish this contention and therefore failed to show that they were eligible for relief under the policy. The Division has raised no other objection to the application of the policy under the present facts and circumstances.

Technical memoranda are statements of the Division's policies (20 NYCRR 2375.6 [a] [1]). The Division has an obligation to apply its policies reasonably and consistently (***see Matter of Meredith Corp. v Tax Appeals Trib.***, 102 AD3d 156, 159 [3d Dept 2012][taxpayer may rely on a longstanding policy of the Division and the Division may not retroactively change such policy]).

The duty to act standard in TSB-M-11(17)S refers to the standard used to determine whether corporate officers or employees are persons required to collect tax on behalf of a

corporation (***see*** Tax Law § 1131 [1]).[6] As petitioners correctly observe, whether an individual is under such a duty depends on the facts of each case (***Matter of Cohen v State Tax Commn.***, 128 AD2d 1022 [3d Dept 1987]). "What must be considered is petitioner's authority and responsibility to exercise control over the corporation, not his actual assertion of such authority (citations omitted)" (***Matter of Coppola v Tax Appeals Trib. of State of N.Y.***, 37 AD3d 901 [3d Dept 2007]).

Upon review of the record, we find that neither petitioner has met his burden of proving that he was not under a duty to act for NS Partners during the period at issue.

Each petitioner had a substantial (33.33%) ownership interest in NS Partners in 2008.[7] Each petitioner also personally guaranteed the loan from Gramercy. We have previously found similar personal guarantees to be an "important consideration" in determining whether an individual is under a duty to act for a business enterprise (***see Matter of Sacher***, Tax Appeals Tribunal, July 2, 2015; ***Matter of Luongo***, Tax Appeals Tribunal, July 10, 2012). Moreover, petitioners' ownership interests and personal loan guarantees together comprise a significant economic interest in NS Partners, a well-established indicia of a duty to act (***see Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990). Each petitioner was involved in the negotiation of the loan from Gramercy. Specifically, Mr. Henrie, as principal of Namwest, assented to the terms of the loan agreement as contained in the December 12, 2006 letter addressed to him from Gramercy (***see*** finding of fact 8) and Mr. McBride executed the loan

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[6] The duty to act standard for corporate officers and employees thus stands in contrast to the per se liability of LLCs and LLC members under Tax Law § 1131 (1).

[7] In their brief on exception, petitioners assert, as they did below, that each owned 16% of NS Partners. We reject this assertion and agree with the Administrative Law Judge's finding that petitioners each indirectly owned 33.33% of NS Partners during the period at issue (***see*** finding of fact 11). We note that this finding is supported by a letter, dated July 13, 2011, from petitioner's representative to the Division's auditor, which is part of Division's exhibit V in the record.

agreement itself (***see*** finding of fact 9). Petitioners' knowledge of and agreement to the terms of the loan agreement is particularly significant here because Gramercy's assertion of its rights under the loan agreement resulted in the nonpayment of the sales tax at issue. Each petitioner also participated in the hiring of the owner's representative, through whom NS Partners asserted control over the hotel's employees (***see*** finding of fact 4). Each had the right to review the hotel's books and records (***id***.). Additionally, both petitioners signed NS Partners' liquor license application (***see*** finding of fact 5). Mr. McBride was the manager of Namwest, an entity that indirectly owned 99% of NS Partners; the president of Namwest Niagara MM, Inc., an entity that owned 1% of NS Partners; and, as indicated on NS Partners' application for registration as a sales tax vendor (which he filed), manager of NS Partners (***see*** findings of fact 1, 4 and 5). Such titles are indicative of authority and a duty to act for the entity (***see Matter of Constantino***). Mr. McBride signed the management agreement with Sentry, by which NS Partners delegated much of the day-to-day operations of the hotel to Sentry (***see*** finding of fact 4). The authority to make such a significant delegation is plainly an indication of authority and a duty to act for the LLC. Mr. McBride also signed NS Partners' 2008 New York partnership tax return (***see*** finding of fact 25). The authority to sign tax returns is also well-established as an indication of a duty to act (***see*** 20 NYCRR 526.11 [b] [2]). He was also frequently present at the hotel (***see*** finding of fact 4).

In our view, the foregoing facts clearly establish Mr. McBride's duty to act for NS Partners in complying with the Tax Law during the period at issue. The evidence of Mr. Henrie's duty to act is not as abundant. However, Mr. Henrie did have a significant economic interest in NS Partners; he personally guaranteed the Gramercy loan; he was involved in the negotiation of the loan; he was principal of Namwest; and he participated in the hiring of the owner's representative. Given these facts, and considering that Mr. Henrie did not contend that he lacked

authority to act or was precluded from acting for NS Partners before Gramercy took action following the default in March 2008, we find that Mr. Henrie failed to meet his burden of proof to show that he was not under a duty to act for NS Partners during the period at issue.

As noted, petitioners contend that they were precluded from acting on behalf of NS Partners after Gramercy took control over the operations and operating revenue of the hotel in March 2008. Petitioners thus contend that, as of March 2008, they were not under a duty to act for NS Partners with respect to the payment of sales taxes. As discussed previously, however, our decisions in ***Matter of Kieran*** and ***Matter of Button*** hold that a person required to collect sales tax is not relieved of liability where, as in the present matter, a creditor takes action pursuant to an agreement with the business and such action results in the nonpayment of sales taxes. Furthermore, ***Kieran*** and ***Button*** specifically determined that corporate officers were not relieved of their "duty to act" for the corporation under those circumstances. The rule of those cases requires a similar finding here; that is, petitioners here were not relieved of their duty to act for NS Partners by Gramercy's actions. We find, therefore, that petitioners do not qualify for relief under the technical memorandum.

As to petitioners' equal protection claim, there is no evidence in the record to show that they have been treated differently than similarly situated taxpayers. "Without a showing of uneven treatment, there is no equal protection violation [citations omitted]" (***Matter of Purcell***, Tax Appeals Tribunal, November 14, 2016). Hence, this claim is without merit.

Turning now to the issue of penalties, where, as here, a taxpayer fails to timely pay sales tax (***see*** finding of fact 15), the taxpayer "shall be subject to" penalties and penalty interest (***see*** Tax Law § 1145 [a] [1] [i] and [ii]). Penalties must be abated if the taxpayer's failure was due to "reasonable cause and not due to willful neglect" (Tax Law § 1145 [a] [1] [iii]).

We agree with the Administrative Law Judge that petitioners have not shown that NS Partners' failure to timely pay over sales tax collected from its customers was due to reasonable cause and not due to willful neglect.

We recognize that petitioners were in a difficult situation during the period at issue as their business had defaulted on the loan to Gramercy, who took control of the hotel's revenues. Although they lacked the resources to cure the default, they continued to try to regain control. Unfortunately, petitioners put themselves into that situation by entering into a loan agreement that provided the lender with certain rights in the event of a default. A default by NS Partners, or at least the inability to cure a default, was a foreseeable consequence of financial difficulties. Financial difficulties are not a reasonable cause for failure to timely pay sales tax (***Matter of Cook v Tax Appeals Trib. of State of N.Y.***, 222 AD2d 962, 964 [3rd Dept 1995]). Furthermore, Gramercy's control of the hotel's revenues under the loan agreement, which impeded the timely payment of sales tax, was also, in our view, a foreseeable consequence of financial difficulties given the terms of that agreement, and thus does not constitute reasonable cause for petitioners' failure herein. Additionally, a taxpayer's previous compliance record may be considered as a factor in determining reasonable cause (***see*** 20 NYCRR 2392.1 [b]). This factor weighs against petitioners here because NS Partners was in arrears on its sales taxes before the period at issue (***see*** finding of fact 13).

Finally, we note that in properly denying the petitions and the claims for refund in his determination, the Administrative Law Judge improperly sustained the May 26, 2009 and July 27, 2009 notices of determination (***see*** finding of fact 20). The petitions in this matter were filed in protest of the May 23, 2012 refund claim denials (***see*** finding of fact 23). Petitioners did not timely file any petition or request for conciliation conference in protest of the notices of

determination (***see*** finding of fact 20). Our jurisdiction in this matter thus extends only to the refund claim denials and not to the notices of determination (***see*** Tax Law §§ 1138 [a] [1] and 1139 [c]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of James W. Henrie and Michael M. McBride is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of James W. Henrie and Michael M. McBride are denied; and
4. The May 23, 2012 notices of disallowance of petitioners' refund claims are sustained.

DATED: Albany, New York
November 22, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner